APPENDIX A

Opinion of the United States Court of Appeals for the Eleventh Circuit, dated September 3, 1999

BOSS CAPITAL, INC., a Florida corporation, Plaintiff-Appellant,

v.

CITY OF CASSELBERRY, a Florida municipal corporation, Defendant-Appellee.

No. 98-2802.

Before DUBINA and HULL, Circuit Judges, and O'KELLEY, Senior District Judge.[1]

DUBINA, Circuit Judge:

Boss Capital, Inc. owns strip clubs. It wants to open a club in a building it leases in Casselberry, Florida, but Casselberry's zoning ordinance prohibits it from operating at that location. In this appeal, Boss Capital challenges the constitutionality of Casselberry's zoning ordinance. It also challenges the constitutionality of the licensing provisions of Casselberry's adult entertainment ordinance. The district court granted summary judgment for Casselberry on both of these claims. We conclude that the licensing provisions are valid but that the validity of the zoning provision turns on a factual question the district court left unresolved. We therefore affirm in part and remand this case to the district court with

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1. Honorable William C. O'Kelley, Senior U.S. District Judge for the Northern District of Georgia, sitting by designation.

instructions to reconsider the validity of the zoning provisions in light of this opinion.

I.

We address the zoning ordinance first. An adult entertainment establishment in Casselberry may operate only in the C-G (Commercial-General) zoning district, but even within that zone, it may not operate within 1000 feet of a church, a school, a public park or recreation area, another adult entertainment establishment, or an area zoned for residential use. See Casselberry Code art. III, s 14-75(a) (reprinted in appendix). The ordinance grandfathers establishments in existence in Casselberry as of the ordinance's effective date. See Casselberry Code art. III, s 14-76(a) (reprinted in appendix). All the parties agree that if one of the existing establishments closes, a new adult entertainment establishment may operate in the same location as a "nonconforming use" until the use "is removed or abandoned, or ceases for a continuous period of more than 90 days." Casselberry Code part III, s 2-8.9 (reprinted in appendix).

Boss Capital leased a building in Casselberry with plans to open a strip club there. The building is almost 1000 feet from residentially zoned property, but almost wasn't good enough. Casselberry refused to permit Boss Capital to use the site for adult entertainment.

Appropriately, the district court turned to *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986), to decide whether Casselberry's zoning ordinance is constitutional. That case holds that municipalities may constitutionally apply zoning regulations to nude dancing establishments as long as the regulations are narrowly tailored to serve a substantial government interest and leave open reasonable alternative avenues of expression. See id. at 50-54,

106 S.Ct. 925. The dispute in this case is whether Casselberry's zoning ordinance leaves open reasonable alternative avenues of expression.

Whether a zoning ordinance leaves open reasonable alternative avenues of expression depends on how many sites are available. *See Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1361 (11th Cir.1999). Availability, in turn, is a matter of economics. A site is available for our purposes as long as adult entertainment establishments may vie for it in the real estate market "on an equal footing with other prospective purchasers and lessees." City of Renton, 475 U.S. at 54, 106 S.Ct. 925.

The district court counted six available sites. Two other sites might be available, but factual questions kept the court from deciding on summary judgment whether they are actually available. The district court left those questions unresolved because it held that six sites are enough for a city of Casselberry's population (24,100).

Boss Capital does not appear to dispute that six are enough. Rather, it argues that the six sites the district court included should not count. Three of the sites are outside the city limits. Casselberry insists that these sites should count because they are close to town (978 feet, 121 feet and 1.25 miles). The other three sites the district court counted are in Casselberry, but they are grandfathered sites that do not comply with the ordinance's distance requirements.

Whether a site is available is generally a factual question, but whether the sites outside Casselberry's borders and the grandfathered sites count are legal questions which the district court resolved on summary judgment and we review de novo. *See Parks v. City of Warner Robins*, 43 F.3d 609, 612-13

(11th Cir.1995).

A.

We turn first to the grandfathered sites. The ordinance permits the current occupants to remain where they are for as long as they want, but a new occupant may only operate an adult entertainment establishment at one of the grandfathered sites if no more than 90 days has passed since the last adult entertainment establishment operated there. See Casselberry Code art. 3, s 14- 76(a); id. part III, s 2-8.9. The likelihood that a shoe store or a grocery will move into one of the sites, or that one of the sites will sit vacant for more than 90 days, is, if not great, at least significant. If any of those things happen, the site is no longer available.

Still, for now at least, the three (defeasibly) grandfathered sites are available. Boss Capital has every right to outbid its competitors and buy or lease one of the grandfathered sites out from under one of the current occupants. This convinces us to include the grandfathered sites in the "reasonable alternative avenues of expression" equation.

B.

That leaves the three sites outside the city limits. Whether Casselberry may rely on those sites is an issue this court has not yet faced, although the Supreme Court has faced it and left the question open. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 76-77, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981); *id.* at 78, 101 S.Ct. 2176 (Blackmun, J., concurring). We opt to leave it open as well because it is our custom not to decide difficult constitutional questions unless we must. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring). The district court noted that one or two other sites might be available inside the city limits. If they are, we probably will not

have to decide whether the sites outside the city limits should count because four or five sites are most likely adequate for Casselberry.

We do not hold, however, that three sites alone are inadequate for Casselberry. That question too is a difficult one we might not need to decide. Instead, we remand this case to the district court for it to resolve whether the sites inside the city limits are actually available. Then, if it must, it should consider whether the available sites constitute reasonable alternative avenues of expression.

In deciding whether three or four or five sites constitute reasonable alternative avenues of expression, the district court should consider more than just Casselberry's population. It should also consider Casselberry's geographical size, the number of acres available to adult entertainment establishments as a percentage of that size, where the sites are located, the number of adult entertainment establishments currently in existence in Casselberry, and the number of adult entertainment establishments wanting to operate in Casselberry. In short, whether a given number of sites constitutes reasonable alternative avenues of expression is an issue to be resolved on a case-by-case basis, taking into account any factors that may affect whether adult entertainment establishments are on "equal footing with other prospective purchasers and lessees." *City of Renton*, 475 U.S. at 54, 106 S.Ct. 925; *see also Int'l Food & Beverage Sys. v. City of Ft. Lauderdale*, 794 F.2d 1520, 1526 (11th Cir.1986)(referring to "community needs, the incidence of nude bars in other comparable communities, the goals of the city plan, and the kind of city the plans works towards").

In light of this, we affirm the district court's judgment insofar as it held that the grandfathered sites may be considered in the "reasonable alternative avenues of expression" equation.

In light of this, we affirm the district court's judgment insofar as it held that the grandfathered sites may be considered in the "reasonable alternative avenues of expression" equation. In accordance with our custom of only deciding difficult constitutional questions when necessary, however, we remand this case to the district court for it to determine whether one or two more sites are available inside the city limits. If need be, the district court should then decide whether the total number of sites constitutes reasonable alternative avenues of expression.

II.

We now turn to Casselberry's adult entertainment licensing ordinance, to which Boss Capital has two objections. Its first objection is that the ordinance does not provide for prompt judicial review in compliance with *Freedman v. Maryland*, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), because it does not guarantee that courts will promptly resolve appeals from administrative license denials. Second, it contends that the ordinance gives licensing officials too much discretion in violation of *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969).

A.

We have twice pretermitted the question whether *Freedman* 's requirement of prompt judicial review, as reflected in *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990) (plurality opinion), requires licensing ordinances to explicitly provide for prompt judicial review. *See Lady J. Lingerie*, 176 F.3d at 1363; *Redner v. Dean*, 29 F.3d 1495, 1501-02 & n. 9 (11th Cir.1994) (discussing *Cent. Fla. Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515 (11th Cir.1985); *Miami Herald Publ'g Co. v. City of Hallandale*, 734 F.2d 666, 675-76 (11th Cir.1984)). As we have observed, a

general right to judicial review of administrative decisions may be enough. Casselberry's ordinance contains an explicit judicial review provision, see Casselberry Code art. III, s 14- 99(c) (reprinted in appendix), so the question in this case is slightly different: whether *Freedman* and *FW/PBS* require a guarantee of prompt judicial resolution of license denials.

This is an issue on which there has been some disagreement since the Supreme Court decided *FW/PBS*. Justice O'Connor's plurality opinion in that case says that "there must be the possibility of prompt judicial review in the event that [a] license is erroneously denied." *FW/PBS*, 493 U.S. at 228, 110 S.Ct. 596 (emphasis added). Later she says that the Dallas ordinance violates the First Amendment because "[i]t also fails to provide an avenue for prompt judicial review . . ." *Id.* at 229, 110 S.Ct. 596 (emphasis added). In concurrence, Justice Brennan does not explicitly disagree with the plurality opinion on this issue, but he characterizes the right to prompt judicial review differently, referring to it as the right to "a prompt judicial determination." *Id.* at 239, 110 S.Ct. 596 (Brennan, J., concurring) (citing *Freedman*, 380 U.S. at 58-59, 85 S.Ct. 734).

This difference between Justice O'Connor's and Justice Brennan's characterizations of the right to prompt judicial review has spawned a split in the circuits. The First, Fifth and Seventh Circuits hold that for licensing ordinances, prompt judicial review only means access to prompt judicial review. *See TK's Video, Inc. v. Denton County*, 24 F.3d 705, 709 (5th Cir.1994), followed in *Grand Brittain, Inc. v. City of Amarillo*, 27 F.3d 1068, 1070-71 (5th Cir.1994) (per curiam); *Graff v. City of Chicago*, 9 F.3d 1309, 1324-25 (7th Cir.1993) (en banc); *Jews for Jesus, Inc. v. Mass. Bay Transp. Auth.*, 984 F.2d 1319, 1327 (1st Cir.1993). On the other side are the Fourth and Ninth Circuits and arguably the Sixth, which hold

that *Freedman* and *FW/PBS* require a guarantee of prompt judicial resolution. *See Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1101-02 (9th Cir.1998), followed in *4805 Convoy, Inc. v. City of San Diego*, 183 F.3d 1108 (9th Cir.1999); *11126 Baltimore Boulevard, Inc. v. Prince George's County*, 58 F.3d 988, 998- 1001 (4th Cir.1995) (en banc); *cf. East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 224-25 (6th Cir.1995) (state certiorari procedures an insufficient guarantee of prompt judicial review).

We have not yet decided whether *Freedman* and *FW/PBS* require municipalities to guarantee prompt judicial resolution of appeals from license denials. In *Redner*, the Citrus County ordinance did not even provide access to prompt judicial review. See 29 F.3d at 1501-02. We did not hold that mere access is insufficient. But see *4805 Convoy*, 183 F.3d at 1108 n.7 (reading *Redner* as saying that access to judicial review is insufficient). We address that issue for the first time today.

Boss Capital makes a good argument that *Freedman* requires prompt judicial resolution of censorship decisions, but in the end we conclude that access to prompt judicial review is sufficient for licensing decisions. *Freedman* itself unmistakably requires "a prompt final judicial decision." 380 U.S. at 59, 85 S.Ct. 734; *see also id.* ("final judicial determination on the merits"; "judicial resolution"). Moreover, *Freedman* ' s progeny also require an assurance of a prompt judicial decision. *See Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. at 560, 95 S.Ct. 1239 ("a prompt final judicial determination must be assured") (1975); *United States v. Thirty-Seven (37) Photographs*, 402 U.S. 363, 371-74, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971) (plurality opinion) (in Part I of the plurality opinion, joined by six Justices, imposing time limits for completion of judicial proceedings in obscenity forfeiture cases); *Blount v.*

Rizzi, 400 U.S. 410, 417, 91 S.Ct. 423, 27 L.Ed.2d 498 (1971) ("a final judicial determination on the merits within a specified, brief period").

Still, none of these pre-*FW/PBS* cases involved a licensing ordinance for adult entertainment establishments. Instead they involved censorship. In *Freedman*, for instance, state law authorized public officials to ban movies it found to be obscene. 380 U.S. at 52-53 n. 2, 85 S.Ct. 734. For good reason, *Freedman* ascribes great importance to prompt judicial resolution of the validity of these sorts of decisions; courts' relative institutional insulation from political pressures makes them less apt to erroneously suppress unpopular expression. See Henry P. Monaghan, *First Amendment "Due Process"*, 83 Harv. L.Rev. 518, 520-24 (1970).

The dangers of censorship are less threatening when it comes to licensing schemes. Unlike censors, who pass judgment on the content of expression, licensing officials look at more mundane and ministerial factors in deciding whether to issue a license. *See 11126 Baltimore Boulevard*, 58 F.3d at 1003 (Niemeyer, J., concurring in part and dissenting in part) (no need for a guarantee of a prompt judicial decision in the absence of a direct prior restraint on speech); see also *FW/PBS*, 493 U.S. at 229, 110 S.Ct. 596 (Licensing officials do not pass judgment "on the content of any protected speech"; rather, they look at "the general qualifications of each license applicant, a ministerial action that is not presumptively invalid."). Indeed, *Shuttlesworth* limits licensing officials to the mundane and the ministerial. *See Lady J. Lingerie*, 176 F.3d at 1362 (holding that *Shuttlesworth* requires licensing standards to be "precise and objective"). Furthermore, applicants for adult entertainment licenses, unlike movie distributors who might show a given film in hundreds of theaters around the country, have every incentive to stick it out and see litigation through to its end. *Cf.*

FW/PBS, 493 U.S. at 229-30, 110 S.Ct. 596 (plurality opinion) (no need to put burden of going to court and burden of proof on licensing officials because license applicants have the incentive to go to court). The need for a prompt judicial decision is therefore less compelling for licensing ordinances than for censorship schemes.

In sum, although *Freedman* appears to require prompt judicial resolution of censorship decisions, licensing decisions are different. We believe this is a situation for "treating unlike things differently according to their differences." *Lyes v. City of Riviera Beach*, 166 F.3d 1332, 1342 (11th Cir.1999) (en banc). Accordingly, we agree with the First, Fifth and Seventh Circuits and hold that access to prompt judicial review is sufficient for adult entertainment licensing ordinances. Casselberry's ordinance provides that access: "Any decision of the Community Development Department pursuant to Division 2 (License) may be immediately reviewed as a matter of right by the Circuit Court upon the filing of an appropriate pleading by an aggrieved party." Casselberry Code art. III, s 14-99(c) (emphasis added). We therefore conclude that Casselberry's ordinance does not run afoul of *Freedman*.

B.

Boss Capital also contends that Casselberry's adult entertainment licensing ordinance is invalid because it gives licensing officials too much discretion in violation of *Shuttlesworth*. Whatever the merits of this argument, we conclude that Boss Capital has not preserved this issue for appeal. Boss Capital's first complaint raised the issue, but Casselberry has since repealed one of the provisions to which Boss Capital initially objected. After that, Boss Capital scarcely mentioned the issue before filing its brief with us. The district court did not address the issue. This is not enough to preserve

an issue for appeal, so we decline to address it. *See Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir.1995) (en banc).

III.

In conclusion, we hold that Casselberry's licensing ordinance is valid and that its zoning ordinance might be, depending on the district court's determination on remand whether any additional sites are available for adult entertainment establishments.

AFFIRMED in part and REMANDED.

APPENDIX
Casselberry Code of Ordinances
ARTICLE III. ADULT ENTERTAINMENT ESTABLISHMENTS

DIVISION 1. GENERALLY

Sec. 14-66. Definitions.

The following words, terms and phrases, when used in this Article, shall have the meanings ascribed to them in this Section, except where the context clearly indicates a different meaning:

* * *

Adult Performance Establishment

(a) shall mean an establishment where any employee:

(1) engages in a private performance or displays or exposes any specified anatomical areas to a patron, regardless of whether the employee actually engages in dancing:

(2) wears any covering, tape, pastie, or other device which simulates or otherwise gives the appearance of the display or exposure of any specified anatomical areas, regardless of whether the employee actually engages in dancing:

(3) offers, solicits, or contracts to dance or perform with a patron and accepts any consideration, tip, remuneration or compensation from or on behalf of that person: or

(4) dances or performs with or within three (3) feet of a patron and accepts any consideration, tip, remuneration, or compensation from or on behalf of that person.

(b) It is an affirmative defense that an establishment is not an adult performance establishment if the establishment is a bona fide private club whose membership as a whole engages in social nudism or naturalism as in a nudist resort or camp, or such other establishment in which the predominant business or attraction of the establishment is not the offering to customers of a product, service, or entertainment which is intended to provide sexual stimulation or sexual gratification to such customers, and the establishment is not distinguished by an emphasis on or the advertising or promotion of materials relating to or employees depicting, describing, displaying, exposing, or simulating sexual activities or specified anatomical areas.

(c) An adult entertainment establishment shall not be deemed a place provided or set apart for the purpose of exposing or exhibiting a person's sexual organs in a manner contrary to the first sentence of Section 800.03, Florida Statutes, the State's indecent exposure statute as set forth in the decision of the Supreme Court of Florida in the case of Hoffman v. Carson, 250 So.2d 891 (Fla.1971), appeal dismissed 404 U.S. 981, 92 S.Ct. 453, 30 L.Ed.2d 365 (1971).

Adult entertainment establishment means an adult arcade, adult bookstore, adult motel, adult performance establishment, or adult theater.

* * *

Residential zoning district means any area legally zoned or designated by an adopted comprehensive plan in a manner primarily intended for dwellings.

* * *

Sec. 14-74. Location generally.

All adult entertainment establishments within the City of Casselberry, Florida shall be limited to the C-G (Commercial-General) zoning district and shall be subject to all restrictions enumerated in this Code.

Sec. 14-75. Prohibited locations.

(a) No person shall cause or permit the establishment, substantial enlargement or transfer of ownership or control of an adult entertainment establishment within 1,000 feet of any other adult entertainment establishment or any church, school, public park or public recreation area, or within 1,000 feet of an area

zoned for residential use or designated by an adopted comprehensive plan in a manner primarily intended for dwellings. For purposes of this Section, the term "substantial enlargement" shall mean increasing the size of the permitted or licensed premises by more than ten percent of the original licensed premises.

(b) For the purposes of this Section, distance measurements shall be made in a straight line, without regard to intervening structures or objects, from the nearest property line of the property used as an adult entertainment establishment to the nearest property line of the premises of a church, school, public park or public recreation area, or to the nearest boundary of any area legally zoned or designated by a comprehensive plan in a manner primarily intended for dwellings, without regard to municipal boundaries. Measurement of distances between adult entertainment establishments shall be from lot line to lot line at their nearest points.

Sec. 14-76. Nonconforming uses.

(a) Generally. An adult entertainment establishment which, on the effective date of the ordinance from which this Article is derived, does not comply with the distance requirements of Section 14-75, shall be subject to the nonconforming use provisions contained in the zoning code of the City.

(b) Residential rezoning. If an area is zoned residential or designated by a comprehensive plan in a manner primarily intended for dwellings for the first time, or if an area is

rezoned for residential use or redesignated by a comprehensive plan in a manner primarily intended for dwellings and lies within 1,000 feet of an existing adult entertainment establishment, the adult entertainment establishment shall be considered an existing nonconforming use, as defined in Subsection (a) of this Section, from the effective date of the rezoning ordinance.

DIVISION 2. LICENSE

Sec. 14-96. Required; business classifications.

(a) It shall be unlawful for any person to operate an adult entertainment establishment without having first obtained an adult entertainment license issued by the Community Development Department which is applicable for such establishment, or to continue to operate an establishment where that person knows or has reason to know that the license of the establishment is under suspension, has been revoked or has lapsed. The operation of an adult entertainment establishment without a valid license, where required, shall be grounds for the closing of the establishment upon a finding of fact by a court or other body with proper jurisdiction that the establishment has no valid license.

(b) Adult entertainment licenses referred to in this Article shall be classified as follows:

(1) Adult bookstore

(2) Adult theater

(3) Adult performance establishment

(c) An adult entertainment license for a particular adult entertainment establishment shall be limited to one (1) classification of license.

Sec. 14-99. Issuance or denial.

(a) Generally.

(1) Upon the completion of the investigation and review of an application as required in this Division, upon determination that the applicant meets the requirements of this Division, and upon payment of the appropriate license fee by the applicant, the Community Development Department shall issue the license.

(2) If, after review and investigation as provided in this Division, the Community Development Department determines that one or more of the reasons for denial stated in Subsection (b) of this Section exist, the application shall be denied, and the Community Development Department shall make a written report of the denial and the reasons therefor. A copy of the report shall be sent by certified mail to the designated return address of the applicant on the application.

(b) Grounds for denial. The application for a license shall be denied if one or more of the following conditions are found to exist:

(1) The application does not comply with the requirements of this Article.

(2) The application contains material false information.

(3) The applicant or any of the individuals listed in Section 14-97(b)(1) has a license under this Division which has been suspended or revoked as a result of the implementation of Sec 14-77.

(4) The granting of the application would violate a statute or ordinance or an order from a court of law which effectively prohibits the applicant from obtaining an adult entertainment license.

(c) Judicial review. Any decision of the Community Development Department pursuant to Division 2 ("License") may be immediately reviewed as a matter of right by the circuit court upon the filing of an appropriate pleading by an aggrieved party.

Sec. 14-101. Time limit for action on application. The Community Development Department shall grant or deny all applications submitted hereunder within forty-five (45) days from the date that a completed application with application fee was submitted. Upon expiration of the 45th day, the applicant shall be permitted to begin operating the establishment for which a license is sought, unless and until the Community Development Department notifies the applicant of a denial of the application and states the reason(s) for that denial.

PART III. UNIFIED LAND DEVELOPMENT REGULATIONS

Chapter II

DISTRICT AND GENERAL REGULATIONS

ARTICLE VIII. NONCONFORMING USES AND NONCOMPLIANT STRUCTURES

Section 2-8.9. Abandonment or discontinuance of a nonconforming use. If a nonconforming use is removed or abandoned, or ceases for a continuous period of more than 90 consecutive days, any and every future use of the premises shall be in conformity with the use provisions of the land development regulations. All material and equipment associated with the abandoned or discontinued nonconforming use shall be completely removed from the premises by its owner within six months after the expiration of the 90-day period. No additional structure which does not conform to the requirements of this Article shall be erected in connection with such nonconforming use of land.

APPENDIX B

Order of the United States Court of Appeals for the Eleventh Circuit, denying Boss Capital's Petition for Rehearing, dated October 18, 1999

BOSS CAPITAL, INC.,
Plaintiff-Appellant,

v.

CITY OF CASSELBERRY
Defendant-Appellee.

No. 98-2802.

Before DUBINA and HULL, Circuit Judges, and O'KELLEY, Senior District Judge.

PER CURIAM

The petition(s) for rehearing filed by Boss Capital, Inc.

is DENIED

APPENDIX C

Unreported Opinion of the United States District for the Middle District of Florida, dated September 3, 1999

BOSS CAPITAL, INC.,

Plaintiff,

v.

CITY OF CASSELBERRY,

Defendant.

No. 96-463-CIV-ORL-22B

ANNE C. CONWAY, District Judge

ORDER

This cause comes before the Court for consideration of Defendant City of Casselberry's ("City") Motion for Summary Judgment (Doc. 59) and Plaintiff Boss Capital Inc.'s Motion for Summary Judgment (Doc. 61). Plaintiff challenges the constitutional validity and application of Sections 14-66, *et. seq.*, of the City's Code as originally adopted by Ordinance 717, as readopted by Ordinance 774, and as amended by Ordinance 96-864 (hereinafter collectively referred to as "Ordinance").

I. Standard for Summary Judgment

Summary judgment is appropriate only when the Court is satisfied "that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). In making this

determination, the Court must view all of the evidence in a light most favorable to the non-moving party. *Samples on Behalf* of *Samples v. Atlanta,* 846 F.2d 1328, 1330 (11th Cir. 1988) The moving party has the initial burden of establishing the absence of a genuine issue of fact. *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986). Next, the "non-moving party . . . bears the burden of coming forward with sufficient evidence of every element that he or she must prove." *Rollins v. Techsouth, Inc.,* 833 F.2d 1525, 1528 (11th Cir. 1987). To that end, the nonmoving party must "go beyond the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file', designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex,* 477 U.S. at 324.

II. Background Information

Plaintiff seeks to operate an adult entertainment business in the City of Casselberry. Prior to April 1996, Plaintiff initiated research in the area to locate an appropriate location for the business. In April 1996, Plaintiff entered into a lease for a building, which was previously operated as a bar. The land is located on commercially zoned property almost 1000 feet from residentially zoned property within the City. The City refused to permit Plaintiff to use the property for adult entertainment.

On May 1, 1996, Plaintiff filed suit in this Court against the City claiming that adult entertainment Ordinances 717 and 774 infringed its First Amendment rights. (Doc. 1). On June 17, 1996, the City adopted Ordinance 96-864, which amended the prior two ordinances. Thereafter, on November 20, 1996, Plaintiff filed an amended, eleven count complaint. (Doc. 21) The Court dismissed three counts in an order dated June 10, 1997. (Doc. 25) The remaining allegations are as

follows: (1) the Ordinance does not allow for the legitimate establishment of alternative avenues of communication (Count I); (2) there is improper predicate for the adoption of the Ordinance (Count II); (3) the Ordinance lacks adequate procedural safeguards and does not provide the necessary constitutionally prompt review and thus results in an unconstitutional prior restraint (Count III); (4) the Ordinance is unconstitutionally overbroad (Count VII); (5) Ordinance 717 was improperly enacted (Count VIII); (6) Ordinance 774 was improperly enacted (Count IX); and (7) Ordinance 96-864 was improperly enacted (Count X).

The parties have filed cross motions for summary judgment. Defendant seeks summary judgment on Counts I, II, III, VII, VIII, IX, X, and on lost profit damages. Plaintiff seeks summary judgment on Counts I, VIII, IX, and X.

III. Alternative Avenues of Communication (Count I)

Plaintiff alleges in Count I of the Amended Complaint that the zoning requirements in the Ordinance preclude adult entertainment clubs from engaging in business within the City of Casselberry. The Ordinance limits all adult entertainment establishments within the City to a C-G (Commercial-General) zoning district. Ordinance 96-864, Section II. In addition, the Ordinance provides in relevant part that:

> No person shall cause or permit the establishment, substantial enlargement, or transfer of ownership or control of an adult entertainment establishment within one thousand (1,000) feet of any other adult entertainment establishment, any church, school, public park, or public recreation area, or within one thousand (1000) feet of an area zoned for residential use

> and/or designated by an adopted Comprehensive Plan in a manner primarily intended for dwellings.
>
> For the purpose of this Ordinance, distance measurements shall be made in a straight line, without regard to intervening structures or objects, from the nearest property line of the property used as an adult entertainment establishment to the nearest property line of the premises of a church, school, public park, or public recreation areas, or to the nearest boundary of any area legally zoned and/or designated by Comprehensive Plan in a manner primarily intended for dwellings without regard to municipal boundaries. Measurement of distances between adult entertainment establishments shall be from lot line to lot line at their nearest points.

Ordinance No. 717, Sections VIII and IX.

In its Motion for Summary Judgment, the City argues ample alternative avenues for communication exist because three licensed adult businesses are located within the City and two other potential sites are available. Defendant's Motion for Summary Judgment (Doc. GO) at 2-3. Additionally, the City contends that three adult clubs exist immediately outside the City's boundaries. *Id.* at 3-4. In its Motion, Plaintiff argues that the City has precluded all adult entertainment establishments within the City due to the zoning requirements, set back requirements of 1000 feet from every residentially zoned area, and unavailability of potential sites. Plaintiff's Motion for Summary Judgment (Doc. 61) at 6-7.

Content-neutral time, place, and manner regulations survive constitutional scrutiny as long as they do not unreasonably limit alternative avenues of communication. *City* of *Renton v. Playtime Theaters, Inc.*, 47S U.S. 41, 47 (1986). Courts have not established a bright line rule for determining the reasonableness of an ordinance. However, it is clear from the case law that a site need not be actually available. As the Supreme Court stated in *Renton*, adult entertainment establishments

> must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees . . . . [A]lthough we have cautioned against the enactment of zoning regulations that have 'the effect of suppressing, or greatly restricting access to, lawful speech,' we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices . . . . In our view the First Amendment requires only that (the government) refrain from effectively denying respondents a reasonable opportunity to open and operate an adult theater within the city . . . .

Renton, 475 U.S. at 54.

The Court in *Centerfold Club, Inc. v. City of St. Petersburg*, 969 F. Supp. 1288, 1302 (M.D. Fla. 1997), discussed the issue of determining the relevant real estate market. In that case, the Court explained that "[w]hether a relocation site is available and part of the relevant real estate market is measured in terms of 'genuine possibility.'" *Id.* The Court then noted several factors to consider when determining

whether a potential site is available. First, physical considerations may render a site unavailable. *Id.* In particular, "[a] site is not a genuine possibility when it is 'under the ocean, airstrips of international airports, sports stadiums, areas not readily accessible to the public, areas developed in a manner unsuitable for any generic commercial business, areas lacking in proper infrastructure, and so on.'" *Id.* (quoting *Woodall v. City of El Paso,* 49 F.3d 1120, 1124 (5th Cir. 1995), *cert. denied,* 516 U.S. 988 (1995)). Second, economic considerations may render a site unavailable. *Id.* As the Court explained, this occurs when it is "'unreasonable to believe that it would ever become available to any commercial enterprise.'" *Id.* (quoting *Topanga Press, Inc. v. City of Los Angeles,* 989 F.2d 1524, 1531 (9th Cir. 1993), *cert.* denied, 511 U.S. 1030 (1994)). However, "when a site is part of the relevant market and available to any commercial enterprise, it is irrelevant whether or not the owner will lease the land to the adult establishment." *Id.* (citations omitted) . Third, leases or restrictive covenants between third parties do not render a site unavailable. *Id.* Fourth, "hazardous waste or other factors which render the land more expensive to purchase or lease are also irrelevant." *Id.*

After a court determines the relevant market, it then decides whether the number of sites is reasonable. There is no requirement for how many sites are necessary or what percentage of land must be available. *Id.* at 1303 (citing *3570 East Foothill Blvd., Inc. v. City of Pasadena,* 912 F. Supp. 1257, 1265 (C.D. Cal. 1995), *aff'd,* 99 F.3d 1147 (9th Cir. 1996)). Courts have considered various factors, including "'the percentage of land theoretically available to adult businesses, the number of sites potentially available in relation to the population of the city, the number of sites compared with the existing number of adult businesses, or the number of businesses desiring to offer adult entertainment.'"

Id. (quoting *3570 East Foothill Blvd., Inc.*, 912 F. Supp. at 1265).

Turning to the instant case, this Court must first determine the relevant market. As to the three existing adult entertainment establishments, under the Ordinance, they are grandfathered as nonconforming uses. The Ordinance provides that the set back requirements do not apply to "adult performance establishments formerly defined as adult cabarets existing and operating in Casselberry on February 17, 1992, the effective date of the ordinance from which this Article is derived; provided that any new construction shall be subject to such requirements, regardless of whether the establishment was in existence and operating on such effective date." Ordinance 96-864, Section X. If any of three nonconforming establishments were to close, 5 2-8.9 of the Unified Land Development Regulations would govern. This section provides in pertinent part:

> If a nonconforming use is removed or abandoned, or ceases for a continuous period of more than 90 consecutive days, any and every future use of the premises shall be in conformity with the use provisions of the land development regulations.

Unified Land Development Regulations 5 2-8.9. A nonconforming use is defined as:

> A use of a building or structure or a tract of land which does not, on the effective date of this ordinance or amendment thereto, conform to any one of the current permitted uses or the district in which it is located . . . .

Id. § 2-8.2. Therefore, the closure of any of these businesses might reduce the number of adult clubs in the City.[1] However, according to the Unified Land Development Regulations, another adult club could operate a business in the same location as long as it commences its business within 90 days.

The proper inquiry is whether the zoning Ordinance leaves current and future adult businesses with sufficient opportunities to open and operate. *3570 East Foothill Blvd., Inc. v. City of Pasadena,* 980 F. Supp. 329, 343 n.18 (C.D. Cal. 1997) (citing *Lakeland Lounge v. City of Jackson,* 973 F.2d 1255, 1260 (5th Cir. 1992) . *cert. denied,* 507 U.S. 1030 (1993) (determining reasonableness of sites based on existing adult businesses)). The Ordinance is prospective in nature by allowing existing businesses to continue their use and by permitting new businesses to continue the nonconforming use as long as the use begins within 90 days. Therefore, the Court will consider the three existing uses as part of the relevant market. See *Young v. American Mini Theaters, Inc.,* 427 U.S. 50, 71 n.35 (1976) (upholding adult business zoning ordinances in part because the "Ordinances do not affect the operation of existing establishments but only the location of new ones'"); *International Food & Beverage Systems v. City of Fort Lauderdale,* 794 F.2d 1520, 1526 (11th Cir. 1986) (including potential and existing sites when discussing the issue of alternative avenues); *Walnut Properties, Inc. v. City of Whittier,* 861 F.2d 1102, 1109-10 (9th Cir. 1988) (finding that the ordinance violated the First Amendment because it would force the only existing theater to close with no place to relocate), *cert. denied,* 490 U.S. 1006 (1989).

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1. However, the property identified by McLaughlin as meeting the 1000 foot set back requirement but not the 1000 foot requirement from another adult establishment would be able to support an adult club should the nonconforming use club close.

As to the clubs existing outside the City limits, the Court finds that under the facts of this case, they are properly included as part of the relevant real estate market. The Supreme Court in *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981), considered an ordinance that excluded all live entertainment, including nonobscene nude dancing. In support of the exclusion, the borough argued that "live entertainment in general and nude dancing in particular are amply available in close-by areas outside the limits of the Borough." *Id.* at 76. The Court rejected this argument reasoning that:

> [The Borough's] position suggests the argument that if there were countywide zoning, it would be quite legal to allow live entertainment in only selected areas of the county and to exclude it from primarily residential communities . . . . This may very well be true, but the Borough cannot avail itself of that argument in this case. There is no countywide zoning . . . . Furthermore, there is no evidence in this record to support the proposition that the kind of entertainment appellants wish to provide is available in reasonably nearby areas. The courts below made no such findings; and at least in their absence, the ordinance excluding live entertainment from the commercial zone cannot constitutionally be applied to appellants . . . .

Id.

Unlike the situation in *Schad* where there was no evidence of adult entertainment clubs in surrounding areas, in the instant case, there is evidence in the record of three adult clubs located in the surrounding county. In fact, the clubs are immediately outside the city limits of Casselberry. One is located approximately 978 feet south; another is located

approximately 121 feet south; and the third is located approximately 1.25 miles south. Defendant's Motion for Summary Judgment (Doc. 60), Exhibit 1. Based on the proximity of the clubs to the City, the Court finds that the clubs are to be considered when determining the relevant market.

Regarding the two potential sites for adult entertainment, the parties have submitted affidavits and depositions of expert witnesses Richard Wells for the City and Robert McLaughlin for the Plaintiff. Wells states in his affidavit that the first site is "located approximately in the center of a large parcel at the eastern terminus of Seminola Boulevard. The second area is located at the intersection of Oxford Road and State Road 436." Defendant's Motion for Summary Judgment (Doc. 60), Exhibit 1. McLaughlin in his affidavit states that there are potentially two sites that meet the 1000 foot set back requirement from residentially zoned areas. Plaintiff's Motion for Summary Judgment (Doc. 61), Exhibit A. One is in the southwest corner of the City. McLaughlin contends that the site is not available because it is within 1000 feet of another adult entertainment establishment. *Id.* The other is the northeast part of Seminole Greyhound Park, the area described by Wells as the eastern terminus of Seminola Boulevard. *Id.* McLaughlin states that this site is not available because it is within 1000 feet of a residentially zoned district if measured from property line to property line as required by the Ordinance. *Id.* In addition, he argues that the area has no infrastructure, there is no access to it, and it is occupied by a permanent occupancy unlikely to relocate. *Id.* Lastly, McLaughlin argues that the area identified by Wells at Oxford Road and State Road 436 does not meet the set back requirements and is precluded by legal impediments, such as master leases or restrictive easements. Plaintiff's Opposition (Doc. 65), Exhibit 1, at 7.

Although there is some dispute between the parties as to the availability of the potential sites, the Court does not need to address whether these sites are actually available. Even if only six sites are available (three existing sites and three sites in the surrounding area), the Court holds that the Ordinance does not unreasonably limit alternative avenues of communication. Similar ordinances from other counties and cities in Florida have been upheld. For example, the Eleventh Circuit in *International Food* held that 22 sites left reasonable alternatives. *International Food,* 794 F.2d at 1520. Fort Lauderdale, at the time of the case, had a population of approximately 156,000, creating a ratio of 1 site per 7,090 persons. Similarly, the City of Boynton Beach's ordinance was found to be constitutional where it had 11 sites available. *Southern Entertainment Co. of Fla., Inc. v. City of Boynton Beach*, 736 F. Supp. 1094 (S.D. Fla. 1990). Based on a population of approximately 45,000, the ordinance allowed 1 site per 4,090 persons.

In the instant case, a minimum of 6 available sites exists for a population of approximately 24,100 in an area of 8 square miles; Therefore, 1 site is available for 4,016 persons. Given the size and population of the City, the number of available sites in this case is reasonable. See *Centerfold Club,* 969 F. Supp. at 1306 (holding that St. Petersburg's ratio is inadequate with one site per 12,56S persons). Therefore, summary judgment is due to be granted in favor of Defendant.

IV. Improper Predicate for the Adoption of Ordinance (Count II)

In the Amended Complaint, Plaintiff contends that the Ordinance was adopted without substantial competent evidence and, therefore, lacks proper predicate. Plaintiff's

First Amended Complaint (Doc. 21) ¶ 46.

A city's interest in protecting the quality of urban life from the secondary effects of adult businesses is indeed substantial. *International Eateries of America, Inc. v. Broward County,* 941 F.2d 1157, 1162 (11th Cir. 1991), *cert. denied,* 503 U.S. 920 (1992). The government interest at stake must be gleaned from the ordinance itself. *Id.* at 1162 n.3. In *International Eateries,* the Eleventh Circuit held that the distance restrictions, specific statements that certain businesses have a "deleterious effect" on businesses around them, and the defined purpose of the ordinance as "ensuring that these adverse effects will not contribute to the blighting and downgrading of the surrounding neighborhood," created a substantial government interest. *Id.* at 1162.

Similarly, the Ordinance in the instant case contains a "Findings of Fact" section which establishes a distance restriction (§ 14-75); addresses the deleterious effect to urban neighborhoods (§ 14-69(4) of prostitution, pandering, solicitation, lewd and lascivious behavior, etc.), and foretells the blighting and adverse effects on neighboring businesses (§ 14-69(5)). The Court previously found in its Order dated June 10, 1997 (Doc. 25), that this Ordinance is aimed at the same type of harm found to create a substantial government interest in *Renton* and *International Eateries.* (Doc. 25).

However, such findings of fact alone are not sufficient. "The enacting body must have a reasonable basis for its belief that the harm to be protected against in fact exists." *International Eateries,* 941 F.2d 1157, 1162 (11th Cir. 1991) (citing *Renton,* 475 U..S. at 50). However, a city does not need to perform its own studies. *Id.* According to the Court in *Renton,*

> The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.

Renton, 475 U.S. at 51-52.

In the instant case, within the "Findings of Fact" section, the City states that it is relying on the findings incorporated in Orange County, Florida's adult entertainment code and the findings and declarations as stated in Seminole County, Florida's adult entertainment code. The Court previously noted that the findings of fact in these codes are relevant to the City of Casselberry because Casselberry is in Seminole County and borders Orange County. (Doc. 25). The Court did not dismiss the claim, however, because the findings of those codes were not submitted to the Court at the time of its prior Order. *Id.* As a result, the Court could not determine whether those findings further a substantial governmental interest. Along with its Motion for Summary Judgment, Defendant attached both codes. (Doc. 60, Exhibits 15, 16)

Pursuant to Section 1A-16 of the Orange County Ordinance, the findings of facts are based on:

> evidence and testimony presented at public hearings before the Board of County Commissioners of Orange County, Florida, and on the findings incorporated in the United States Attorney General's Commission on Pornography

> (1986), Jacksonville Municipal Code, Chapter 410, Ord. 77-257-256, 5 1, the Los Angeles Municipal Code, § 12.70, Ord. 156509 (1982), the Detroit Zoning Ordinance, 66,000, Ord. 742-G, S 1, 10-24-82, and "A Summary of a National Survey of Real Estate Appraisers Regarding the Effect of Adult Bookstores on Property Values," conducted by the Division of Planning, Department of Metropolitan Development, Indianapolis, January 1984 . . . .

The Board of County Commissioners stated that it enacted the Seminole County code based on the following:

> in response to the concerns of the Sheriff of Seminole County and numerous residents of Seminole County, have, through public hearing, heard interested parties and citizens for and against the purposes of this Ordinance and have reviewed the findings incorporated in "Adult Entertainment Businesses In Indianapolis, An Analysis" prepared by the Division of Planning, Department of Metropolitan Development, Indianapolis, Indiana, February 1984, which includes a summary of a national survey of real estate appraisers regarding the effects of adult bookstores on property values; "Report on Adult Oriented Businesses in Austin" prepared by the Office of Land Development Services, City of Austin, Texas, May 19, 1986; and the Orange

County, Florida Adult Entertainment Code, 1987.

The findings of fact of these codes outline the various findings made by the county concerning the adverse secondary effects which tend to accompany adult entertainment. For example, the findings state that adult activities: (1) lead to other activities, which are illegal, immoral, or unhealthful, such as prostitution, pandering, solicitation for prostitution, lewd and lascivious behavior, exposing minors to harmful material, possession, distribution and transportation of obscene materials, sale or possession of controlled substances, and violent crimes against persons, and property; and (2) attract an undesirable number of transients, blight neighborhoods, lower property values, promote crime, and lead residents and businesses to move to other locations.

After reviewing the findings of fact of the Orange and Seminole County's codes, the Court finds that those findings further a substantial government interest. Therefore, the City of Casselberry was entitled to rely on these codes and had a reasonable belief that the secondary effects of adult businesses exist.

In its response, Plaintiff argues that the record of the adoption of the Ordinance contains no evidence whatsoever to support the need for the Ordinances," and that the City must present substantial competent evidence of the need for the Ordinance. Plaintiff's Opposition (Doc. 65) at 11. The Court rejects these arguments. A city is not required to conduct new studies or produce evidence independent of that already generated by other cities, so long as the evidence the city relies on is reasonably believed to be relevant to the problem. *Ren ton,* 475 U.S. at 51-52. Therefore, because the Court concludes that the evidence relied upon is reasonably believed

to be relevant to the problem caused by adult businesses, summary judgment is due to be granted in Defendant's favor as to this issue.

V. Prompt Judicial Review (Count III)

Plaintiff alleges that the Ordinance's licensing scheme is facially invalid because it does not provide for prompt judicial review. The judicial review section, § 14-99 of the Ordinance provides:

> (c) Judicial Review. Any decision of the Community Development Department, pursuant to Division 2 (License) may be immediately reviewed as a matter of right by the Circuit Court upon the filing of an appropriate pleading by an aggrieved party.

In its Motion for Summary Judgment, Defendant argues that this provision on judicial review is sufficient to withstand constitutional scrutiny. For support, Defendant urges the Court to apply its ruling in *Florida Video Xpress, Inc. v. Orange County, Florida*, 983 F. Supp. 1091 (M.D. Fla. 1997).

In *Florida Video Xpress*, this Court considered the issue of whether Orange County's adult entertainment code provided for prompt judicial review. *Id.* at 1096 (citing *Redner v. Dean*, 29 F.3d 1495, 1501 (11th Cir. 1994)). That code provided that "[a]ny decision of the tax collector . . . may be immediately reviewed as a matter of right by the circuit court upon the filing of an appropriate pleading by an aggrieved party." *Id.* at 1098. Plaintiffs in that case argued that the code provided for prompt judicial filing, not prompt

judicial review. *Id.* Additionally, they asserted that in order to survive constitutional scrutiny, the code must provide for actual review by a court within a period of time. *Id.* This Court rejected the plaintiffs' arguments and found that:

> [t]his provision provides for prompt judicial review within the meaning of *Freedman*, *FW/PBS*, and *Redner*. The Code requires no further exhaustion of administrative remedies after the tax collector decides. Orange County need not, and could not mandate the manner or time within which the judiciary must review, an adverse decision by the tax collector.

Id. at 1098.

Like the code in *Florida Video Xpress*, the Ordinance in the instant case explicitly provides for judicial review as a matter of right to the circuit court upon the denial of an application. Therefore, the Court finds that the Ordinance provides for prompt judicial review.

Plaintiff argues that *Florida Video Xpress* was incorrectly decided and urges the Court to reexamine the issue of prompt judicial review and find that the law mandates prompt judicial resolution. Plaintiff contends that the court system does not provide for prompt judicial resolution because "[ijf, as is the case in Florida Circuit Courts, a court has the ability and the discretion to create a delay in reaching a prompt judicial resolution by setting leisurely hearing, briefing, and argument schedules, such procedural flexibility provides absolutely no procedural safeguard . . . ." Plaintiff's Opposition (Doc. 65) at 15. However, this Court previously

considered and rejected these arguments in *Florida Video Xpress*. It is unwilling to reconsider its prior ruling. Accordingly, summary judgment in favor of Defendant is appropriate as to this matter.

VII. Proper Enactment of Ordinances 717 and 774 (Counts VIII and IX)

Plaintiff alleges in Counts VIII and IX that Ordinances 717 and 774 were improperly enacted and, therefore, are null and void. Specifically, Plaintiff contends that Ordinances 717 and 774 violate §§ 166.041(3)(c) and 163.3194, Florida Statutes. Amendment Complaint (Doc. 21) at ¶¶ 95-96 and 100-101. Plaintiff also argues that Ordinance 774 is an unconstitutional multi-subject Ordinance, in violation of § 166.041(2), Florida Statutes. *Id.* at ¶ 102.

Section 166.041 (3) (c), Florida Statutes, sets forth the notice and public hearing requirements for the adoption of an ordinance which rezones specific parcels of private real property or which substantially changes permitted uses in a particular zoning district. Defendant argues in its Motion for Summary Judgment, however, that this section does not apply to Ordinances 717 and 774 due to H.B. No. 2055, Chapter 95-310, § 6, which mandates that in enacting these Ordinances, the City had to follow only § 166.041(2), not § 166.041(3) (c)

H.B. No. 2055, Chapter 95-310, § 6 provides in relevant part:

> If any ordinance or resolution was adopted prior to the effective date of this act and the appropriate subsection of 5 166.041, Fla. Stat. was not followed, but the municipality followed the procedure

> of subsection (2) or subsection (3) of § 166.041, Fla. Stat. as they existed at the time of the adoption of such ordinance or resolution, the procedures used for such ordinance or resolution are hereby validated and ratified.

This chapter went into effect on June 15, 1995.

Ordinances 717 and 774 were adopted on February 17, 1992 and September 13, 1993, respectively. Because the Ordinances were adopted prior to June 15, 1995, they had to comply with only § 166.041(2).

Plaintiff argues that Chapter 95-310 denies Plaintiff due process and is, therefore, unconstitutional under the Fifth and Fourteenth Amendments. Plaintiff's Motion for Summary Judgment (Doc. 61) at 18. In particular, Plaintiff contends that the Chapter imposes a statute of limitations that prevents challenges to zoning ordinances. *Id.* at 16.

To determine whether Plaintiff was denied procedural due process in the enactment of the Ordinances, the relevant inquiry is whether Plaintiff has a liberty or property interest that was interfered with by the state and whether the state used constitutional sufficient procedures in interfering with that interest. *First Assembly of God of Naples, Florida, Inc. v. Collier County,* 775 F. Supp. 383, 388 (M.D. Fla. 1991) (citing *Kentucky Dept. of Corrections* v. *Thompson,* 490 U.S. 454 (1989)). The initial determination of whether Plaintiff has a protectable property interest is governed by state law. *Id.* Under Florida law, procedural due process attaches to zoning actions which alter the manner in which a property owner can use the land. *First Assembly of God of Naples, Florida, Inc. v. Collier County,* 20 F.3d 419, 422 (11th Cir. 1994), *cert.*

denied, 513 U.S. 1080 (1995). Because Plaintiff was denied a permit to use the land for an adult club, Plaintiff has met the first prong of the test.

Under the second prong of the test, due process requires that persons deprived of a right must be afforded notice and an opportunity to be heard. *Id.* (citing *Zinermon* v. *Burch,* 494 U.S. 113 (1990)). Plaintiff does not argue that notice was not provided or that it was not given an opportunity to be heard, but that there was only one public hearing, it was not advertised in a newspaper of general circulation in the City, the advertisement was placed with the legal and classified advertisements, and it was not proper in form and context.

Public notification of Ordinance 717 appeared in a local newspaper on February 2, 1992. Defendant's Opposition (Doc. 63), Exhibit 9. In addition, Ordinance 717 was read at two Commission hearings on February 3, 1992 and February 17, 1992. *Id.,* Exhibit 5. Further, this Ordinance was the subject of two public hearings also held on those dates. *Id.,* Exhibits 7 and 8.

Public notification of Ordinance 774 appeared in the Orlando Sentinel on August 29, 1993. *Id.,* Exhibit 11. The Ordinance was read on August 16, 1993 and on September 13, 1993. *Id.,* Exhibit 6. Finally, the Ordinance was the subject of two public hearings held on August 16, 1993 and September 13, 1993. Therefore, because Plaintiff was afforded notice of the Ordinances and an opportunity to be heard at the public meetings, the Court finds that Plaintiff's due process rights were not violated.

In its Motion for Summary Judgment, Plaintiff contends that the notice and hearing requirements of §

166.041(3), Fla. Stat., constitute a fundamental due process right. The Court disagrees. As the Eleventh Circuit stated in *First Assembly,* 20 F.3d at 422:

> Even if the notice in this case is insufficient to satisfy the state statute, the state statute does not define the process due under the federal Constitution. Therefore, even if the state statute has been violated, that does not prove a violation of a federal constitutional right . . . . [W]e emphasize that the violation of a state statute outlining procedure does not necessarily equate to a due process violation under the federal Constitution. If otherwise, federal courts would have the task of insuring strict compliance with the state procedure regulations and statutes.

Id. (quoting *Harris* v. *Birmingham Board of Education,* 817 F.2d 1525, 1527-28 (11th Cir. 1987)). Therefore, even if the City failed to follow the state procedures, no federal constitutional right has been infringed.

Because Plaintiff cannot establish a procedural due process claim, the City had to satisfy only § 166.041(2) to meet the statutory requirements. That subsection provides:

> Each ordinance or resolution shall be introduced in writing and shall embrace but one subject and matters properly connected therewith. The subject shall be clearly stated in the title. No ordinance shall be revised or amended by reference to its title only. Ordinances to revise or

> amend shall set out in full the revised or amended act or section or subsection or paragraph of a section or subsection.

§ 166.041(2), Fla. Stat.

Plaintiff attacks Ordinance 774 by arguing that it is an unconstitutional multi-subject Ordinance[2] because it addresses many subjects, such as handbills, alcoholic

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2. Ordinance 774 provides in relevant part:

SECTION I: The Code entitled "Code of Ordinances, City of Casselberry, Florida," published by Municipal Code Corporation consisting of Chapters 1 through 94, each inclusive, is adopted.
SECTION II: All Ordinances of a general and permanent nature enacted on or before March 1, 1993, and not included in this Code or recognized and continued in force by reference therein, are repealed . . .
SECTION IV: Unless another penalty is expressly provided, every person convicted of a violation of any provision of the Code or any Ordinance, Resolution, order, rule, or regulation adopted or issued in pursuance thereof, shall be punished by a fine not exceeding Five Hundred Dollars ($500.00), or imprisonment for a term not exceeding sixty (60) days, or both a fine and imprisonment. Each act of violation and each day upon which any such violation shall occur shall constitute a separate offense. The penalty provided by this Section, unless another penalty is expressly provided, shall apply to the amendment of any Code Section whether or not such penalty is reenacted in the amendatory Ordinance. In addition, to the penalty prescribed above, the City may pursue other remedies, such as abatement of nuisances, injunctive relief, and revocation of licenses or permits . . . .

beverages, amusements, adult entertainment, animals, businesses, emergency management, fire protection, floods, personnel, solid waste, traffic and vehicles, and utilities. In its Motion, Defendant contends that the Ordinance addresses only one subject matter – the enactment of a new City Code for the city of Casselberry. The Court finds Plaintiff's argument to be without merit. The Ordinance merely adopts and enacts Chapters 1 through 94 of the City of Casselberry's Code. It does not discuss multiple subjects. Thus, Ordinance 774 was properly enacted. Plaintiff does not claim that Ordinance 717 failed to satisfy this statutory requirement.

In the Amended Complaint, Plaintiff also alleges that Ordinances 717 and 774 are void ab initio because they were not referred to a Land Planning Agency for review and a determination of consistency pursuant to § 163.3194, Fla. Stat. In its Motion, Defendant submits exhibits demonstrating that Ordinance 717 was referred to the Land Planning Agency, but Ordinance 774 did not have to be referred to the agency because it is not a land development regulation, but rather an ordinance enacting the City's Code. Plaintiff does not contest Defendant's arguments in its response. Accordingly, summary judgment is appropriate as to this issue.

Lastly, Plaintiff asserts that Ordinance 774 is unconstitutional because it "represents an unlawful delegation of legislative authority to Municipal Code Corporation." Plaintiff's Motion (Doc. 61) at 8-9. Defendant argues that no unlawful delegation occurred because the Code demonstrates that the City itself adopted the Code of Ordinances and that the Code was merely published by Municipal Code Corporation. Defendant's Memorandum (Doc. 60) at 9. Plaintiff does not offer any response to Defendant's position and fails to support the argument with legal authority.

Therefore, the Court rejects Plaintiff's claim. Accordingly, because the Ordinances were properly enacted, summary judgment is due to be granted in favor of Defendant.

VIII. Proper Enactment of Ordinance 96-864 (Count X)

In the Amended Complaint, Plaintiff claims that Ordinance 96-864 should be null and void because it was not enacted in accordance with § 166.041(3) (c), was not reviewed by the Land Planning Agency for the City, and is a multi-subject ordinance.

Subsection (3)(c), as enacted on June 15, 1995 provides in pertinent part:

> Ordinances that change the actual list of permitted, conditional or prohibited uses within a zoning category, or ordinances initiated by the municipality that change the actual zoning map designation of a parcel or parcels of land shall be enacted pursuant to the following procedure . . . .

§ 166.041(3)(c). In its Motion for Summary Judgment, Defendant initially argues that Ordinance 96-864 did not change the zoning designation of any parcel of land in the City and did not change the list of permitted, conditional, or prohibited uses within any zoning district. Rather, the Unified Land Development Regulations ("Regulations"), which were adopted on March 1, 1993, divided the City into zoning districts and established boundaries. When the Regulations were adopted, Defendant asserts that the zoning of the property which is the subject of this lawsuit was changed from zone C-1. to zone CG. Therefore, Defendant contends that Ordinance 96-864 merely reflected the change that

occurred in 1993 and was not a land-use ordinance. As a result, Defendant claims that the Ordinance did not have to comply with § 166.041(3)(c)

Ordinance 96-864 amended Ordinance 717. Ordinance 717 specifically permitted adult uses in the C-1 Zoning District. Ordinance 757, adopted on March 1, 1993, abolished the C-1 Zoning District and adopted the Unified Land Development Regulations. Since the adoption of the Regulations, the City argues that adult uses have been permitted as an "amusement (enclosed)" in the CG zoning district. *See* Affidavit of Wells, Exhibit B, at 2:17. Although the term "amusement (enclosed)" is not specifically defined in the Regulations, the chapter in the City's Code that addresses adult entertainment establishments is titled "Amusements." From this, it is clear that the reference to "amusements" in the Regulations includes adult entertainment establishments. Therefore, because the change in zoning classifications occurred when the Regulations were adopted, the Court finds that Ordinance 96-864 merely reflects the previous change from C-1 to C-G.

Because the Ordinance is not a zoning ordinance, it must be enacted in accordance with § 166.041(3)(a). That subsection provides:

> Except as provided in paragraph (c), a proposed ordinance may be read by title, or in full, on at least two separate days and shall, at least ten days prior to adoption, be noticed once in a newspaper of general circulation in the municipality. The Notice of Proposed Enactment shall state the date, time and place of the meeting; the title or titles of the proposed

> ordinance; and the place or places within the municipality where such proposed ordinances may be inspected by the public. The notice shall also advise that interested parties may appear at the meeting and be heard with respect to the proposed ordinance.

Ordinance 96-864 was adopted on June 17, 1996. Defendant's Opposition (Doc. 63), Exhibit 14. The title was read twice on June 3, 1996 and June 17, 1996. *Id.* at Exhibits 14-16. The Ordinance was advertised May 26, 1996, June 2, 1996, and June 9, 1996 in the Orlando Sentinel, a newspaper of general circulation. *Id.,* Exhibit 17. The three advertisements are identical except that the first two contain typographical errors. Rather than referencing "CG," the May 26, 1996 advertisement referenced "C-6" and the June 2, 1996 advertisement referenced "C-O." However, each advertisement made two references to "Commercial General" as the zoning classification. The notices also stated the date, time, place of the meeting, title, and place within the municipality where the Ordinance can be inspected. *Id.* at Exhibit 17.

Plaintiff argues that the typographical errors are significant and should render the Ordinance void. However, the Court finds that the errors are minor, especially since the zoning classification was spelled out completely in the title and in the legend of the map attached. Accordingly, the notices met the requirements of S 166.041(3) (a)

In its Motion for Summary Judgment, Defendant also argues that Ordinance 96-864 was not required to be reviewed by the Land Planning Agency since it did not change the zoning classification. As previously determined, the

Ordinance did not change the zoning classification, but merely reflected a change that occurred when the Regulations were adopted. Therefore, the City did not need to have the Ordinance reviewed by the Land Planning Agency. Lastly, Defendant argues that the Ordinance does not violate the prohibition against multi-subject ordinances. Plaintiff does not contest this issue. Accordingly, because Ordinance 96-864 was properly enacted, summary judgment is due to be granted in favor of Defendant as to this issue.

IX. Overbroad (Count VII)

In the Amended Complaint, Plaintiff alleges that the provisions of the challenged legislation are substantially overbroad. Defendant asserts in its Motion for Summary Judgment that the Ordinance is not overbroad because it is aimed at combating the adverse secondary effects of adult entertainment establishments. Plaintiff fails to present facts or argument in response. Therefore, summary judgment is due to be granted in favor of Defendant as to this issue.

X. Damages

Finally, Defendant argues that Plaintiff did not specifically state any special damages in the nature of lost profits in the Amended Complaint. Because Defendant's Motion for Summary Judgment is otherwise due to be granted, there is no need for the Court to address this issue.

XI. Conclusion

Based on the foregoing, it is ORDERED as follows:

1. Defendant's Motion for Summary Judgment (Doc. 59), filed February 9, 1998, is GRANTED.

2. Plaintiff's Motion for Summary Judgment (Doc. 61), filed February 9, 1998 is DENIED.

3. This case is removed from the May 1998 trial calendar.

4. The clerk shall enter final judgment for Defendant providing that Plaintiff shall take nothing on its claims against Defendant and that Defendant shall recover costs.

5. The clerk shall close this case.

6. All pending motions are DENIED AS MOOT.

DONE AND ORDERED in Chambers, Orlando, Florida, this 11th day of May, 1998.

Anne C. Conway
United States District Judge